THE WILDERNESS SOCIETY

IBLA 88-646 Decided July 20, 1989

Appeal from a decision issued by the Tonopah Resource Area Manager approving a mining plan of operations. N67-88-009P.

Appeal dismissed.

1. Administrative Procedure: Administrative Review--Mining Claims: Plan of Operations--Rules of Practice: Appeals: Standing to Appeal--Rules of Practice: Protests

   A group that has not participated in agency decisionmaking prior to approval by BLM of a mining plan of operations is not a "party to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal.

2. Administrative Procedure: Adjudication--Administrative Procedure: Administrative Review--Administrative Procedure: Decisions--Rules of Practice: Appeals: Standing to Appeal

   A group is not entitled to personal notice of all planned actions affecting public lands in Nevada simply because it has asserted a general interest in natural resource development in the State.

3. Administrative Procedure: Administrative Review--Administrative Procedure: Judicial Review--Mining Claims: Plan of Operations--Rules of Practice: Appeals

   Except in areas under wilderness review, mining plans of operations become effective immediately upon approval pursuant to provision of 43 CFR 3809.4(b). This regulatory provision makes approval of a mining plan of operations a final Departmental action immediately subject to judicial review.

4. Administrative Procedure: Administrative Review--Mining Claims: Plan of Operations--Rules of Practice: Appeals: Standing to Appeal

   To obtain standing for review by the Board of Land Appeals a party must have participated in Bureau of Land

> Management decisionmaking prior to issuance of the decision sought to be reviewed. Even though a group may be adversely affected by decisionmaking, it lacks standing to appeal if it is not a party to a case.

APPEARANCES: W. Douglas Kari, Esq., Los Angeles, California, for appellant; Charles L. Kaiser, Esq., Denver, Colorado, for intervenor Bond Gold Bullfrog, Inc.; Burton J. Stanley, Esq., Office of the Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On August 30, 1988, The Wilderness Society (Society) appealed from a decision issued August 5, 1988, by the Tonopah Resource Area Manager, Bureau of Land Management (BLM), approving a mining plan of operations for the Bullfrog project in Nye County, Nevada. The Bullfrog project is a large open-pit gold mine. On November 10, 1988, Bond Gold Bullfrog, Inc. (Bond), the operator of the mining operation concerned, was permitted to intervene as a party to this appeal. Society, on January 3, 1989, applied for a stay of BLM's decision or expedited review by this Board. Thereafter, Bond moved to dismiss Society's appeal for lack of standing and the parties were allowed to brief the procedural and substantive issues raised by the appeal. Expedited review of this appeal is granted, as is the motion to dismiss.

The Area Manager's decision to approve Bond's plan of mining operations was reached following preparation of a final environmental assessment of the proposed Bullfrog mining project (FEA) in July 1988. The FEA had been preceded by a draft environmental assessment (DEA) which was prepared in response to the proposed plan of operations for the Bullfrog project submitted to BLM in January 1988. BLM announced by publication in local newspapers and posted notices that a public meeting concerning the plan would be held at Beatty, Nevada, on February 25, 1988. Comments were solicited, and were received until June 23, 1988. Seventy-two people attended the Beatty meeting.

Thirteen letters commenting upon the project were received. Federal, State, city, and county officials were notified of the pending mining plan, as were private organizations and individuals listed in the FEA. Society was not among the groups notified, and did not participate in the proceedings which culminated in approval of the Bullfrog plan on August 5, 1988. Nevertheless, Society alleges that its members use lands affected by BLM's decision to approve Bond's mining plan of operations, and contends that it is a party to this case by virtue of its interest in the project and actions taken immediately following the BLM decision of August 5, 1988.

On appeal, Society complains that it should have received notice of the pending mining plan of operations so that it could have participated as an interested party in the decisionmaking preceding approval of Bond's plan. Society contends that BLM's failure to give direct notice to Society of the pending plan of operations was error because

> Society has repeatedly requested BLM offices throughout Nevada to provide it with notice about proposed public land actions, and Society regularly receives and comments on such notices. There is no excuse for BLM's failure to notify Society about the Bullfrog Project, especially when Society, which maintains its regional office in San Francisco, is dependent on agency cooperation to stay informed about proposed actions in Nevada.

(Reply Statement of Reasons (reply) at 6). Society's reply continues that

> [i]t is undisputed that Society did not learn about the Bullfrog Project until early August, 1988, and that it did not receive a copy of the Final EA until August 10, 1988. Nonetheless, BLM and Bond Gold suggest that Society had constructive notice of the Bullfrog Project because of notices published in the Tonopah Times, Pahrump Valley Times, and Gateway Gazette. Society, however, subscribes to none of these local papers, which have a combined total circulation of less than 15,000 persons. BLM and Bond Gold also cite to articles in other publications, although they omit copies. A search of the more than eight million stories in the NEXIS computer library, however, which includes stories from most major United States and foreign newspapers, magazines, journals, newsletters, and wire services, reveals no items mentioning the "Bullfrog Project" between December 15, 1987, and July 15, 1988. Of the few stories that appeared before or after that period, none mentioned any environmental review process. [Citations omitted.]

(Reply at 6, 7).

It is against the environmental review conducted by BLM that Society directs its main attack, contending that BLM violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. | 4332(2)(C) (1982) when it failed to prepare an environmental impact statement (EIS) for the Bullfrog project, which it contends is a major action affecting the human environment (Statement of Reasons (SOR) at 1, 14, 15-27). Society also contends that BLM failed to comply with section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. | 1536(a)(2) (1982), when it did not hold a formal consultation with the U.S. Fish and Wildlife Service concerning endangered species which might be affected by use of groundwater for the Bullfrog project (SOR at 2, 14, 28-32). The third argument made by Society is that BLM failed to comply with provisions of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. | 703 (1982), when it failed to adequately guard against the accidental poisoning of birds by exposure to cyanide leach ponds proposed for Bond's mine (SOR at 2, 14, 32-34). Finally, Society would find BLM violated the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. || 1761(a) and 1770(a) (1982), by failing to require rights-of-way permits for water pipelines used to convey water to Bond's operations (SOR at 2, 14, 35-39). Society seeks a halt by Bond of the execution of its approved plan of operations until an EIS shall have been prepared, and until the other claimed defects have been cured.

Immediately after approval of its mining plan in August 1988, Bond commenced construction of an open-pit mine and attached works, which are said to

> include mine development and mill construction activities. Bond's mining contractor, Industrial Constructors Corporation, has removed the growth medium from the entire project site; has excavated the Bullfrog Pit by drilling, blasting and hauling approximately 13.5 million tons of waste rock; has built and has begun lining the 70-foot high tailings disposal facility, and has begun stockpiling ore. Bond's construction contractor, Fluor Daniel, Inc., through various subcontractors has completed concrete construction work for the mill, has erected the adsorption and leaching tanks needed for the carbon-in-pulp processing, and has procured and moved onsite crushing, grinding, and other heavy mill equipment. Bond has drilled and completed water wells necessary to serve the project. Bond has spent approximately $50 million on the Bullfrog project to date, has committed approximately $50 million more under purchase and service orders and agreements, and has brought approximately 500 workers onsite to compete mine development and mill construction work. [Citations omitted.]

(Joint Answer of Bond and BLM at 18, 19).

While denying that Society has standing to appeal, Bond also argues that the mining plan of operations was correctly approved by BLM after a complete environmental analysis that complies in all relevant aspects with requirements of NEPA, and that it has not violated provisions of ESA, MBTA, and FLPMA. Bond argues that the principle issue Society seeks to raise, which concerns the effect of the use of groundwater upon the desert fauna in the vicinity of the mine, was fully explored by BLM in the DEA and FEA, which fully comply with all planning requirements imposed by NEPA. Bond also argues that Society has been guilty of laches in making its objections to the mine known, and that, by knowingly allowing construction of the mine to proceed before taking action to stop the project, has acquiesced in the plan approved by BLM.

[1] In Mark S. Altman, 93 IBLA 265 (1986), we summarized the development of the doctrine of standing applied by this Board to cases coming before it for review, stating

> 43 CFR 4.410(a) provides that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board." To be a "party to a case" a person must have "actively participated in the decisionmaking process regarding the subject matter of [the] appeal." To be "adversely affected" by a decision "the record must show that appellants have a legally recognizable interest." The interest need not be an economic or a property interest; use of the land involved or ownership of adjoining land suffices. "Mere 'interest in a problem'" or "deep concern with the issues" involved, however, does not. The Board will not

> speculate why an appellant is concerned about a decision, i.e., what interest is adversely affected. Appellant must allege or the record must show an interest that is injured. A person must be both a party to a case and have an adversely affected recognizable interest in order to have a right to appeal to the Board. If either element is lacking, an appeal must be dismissed. [Citations omitted.]

Id. at 265, 266. Society admits that it did not participate as a party to this case prior to the August 5, 1988, decision which it challenges, but argues that it was prevented from participation in BLM's decisionmaking by BLM's failure to give required notice that Bond's plan of operations was pending before the agency. This failure to give actual, direct notice, Society contends, protects this appeal from dismissal. Society argues that it appealed as soon as it learned of the existence of the Bullfrog project, and that it has been as diligent as possible considering the scant notice given.

[2] It appears that Society may be trying to bring itself within the class of persons entitled to notice of further agency proceedings, as described in Utah Wilderness Association, 91 IBLA 124 (1986). There is, however, no indication in the record that Society either participated in this case prior to decision or that it had been promised personal notice of the pendency of such cases as this by BLM. Society's assertion that it had other dealings with BLM in Nevada, quoted above, falls far short of a showing that Society was entitled to actual direct notice of the pending Bullfrog plan of mining operations in the Tonopah Resource Area.

Society finds itself in the position of the appellant in Edwin H. Marston, 103 IBLA 40 (1988). As in Marston, Society did not participate in the proceedings in the case prior to the announcement of a decision by BLM, and is therefore not a party to a case, within the meaning of the Board's regulation governing standing, 43 CFR 4.410(a). That its members may have used public lands affected by the decision and therefore have been adversely affected by the decision is beside the point of this issue, which concerns the requirement that one be a "party to a case." Id. at 42.

[3] Society argues that it should be considered a party to this case because it came through a "30-day window" afforded by 43 CFR 4.21(a) when it requested reconsideration of BLM's decision during a presumed 30-day period before the decision became effective. To make this argument, Society relies on regulatory language stating that:

> Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. [Emphasis supplied.]

43 CFR 4.21(a).

Except for areas under wilderness review, in the case of mining plans of operations, however, 43 CFR 4.21(a) is not effective, because 43 CFR 3809.4(b) provides otherwise. (Compare 43 CFR 3802.5, which does not provide otherwise.) That is, the regulation providing for appeals from decisions concerning mining plans of operations gives them immediate effect. Such decisions are not stayed pending appeal, although a stay can be granted by the authorized officer. If it is not, the decision is a final decision of the Department and a party aggrieved can either appeal within the Department or take his grievance to the judicial branch, since his administrative remedy has, at that point, been exhausted sufficiently to permit judicial review. 5 U.S.C. | 704 (1982); 4 K. Davis, Administrative Law Treatise | 26:10 (1983). While further administrative review within the Department is possible, it is no longer necessary, and any party may pursue whatever remedy is deemed best. Id. As a consequence, there is no "30-day window" following the agency decision through which a would-be party may gain entrance to further Departmental review.

[4] Nor would such a window open in any case, even if decisions approving mining plans of operations had not been given final effect by Departmental regulation. 43 CFR Subpart 3809. Prior decisions of this Board make clear that participation as a party in Departmental proceedings prior to issuance of a decision from which review is sought is required for standing before this Board. For persons such as Society who are not immediately affected as either an applicant or person against whom the Department has asserted some claim of right, it is clear that the customary way to become a party is by making a protest against a proposed action before it is implemented. See, e.g., Willamette Logging Communications, Inc., 86 IBLA 77 (1985). Clearly, some prior participation is required. Mark S. Altman, supra. The reason for this requirement is practical: it fosters the dispatch of the Department's business and, in the interest of administrative economy limits review to cases where the parties have an interest which has been considered in the course of decisionmaking. (For a discussion of the authority of administrative agencies to fashion such rules for the conduct of agency business see Koniag, Inc., Village of Uyak v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cited in In re Pacific Coast Molybenum Co., 68 IBLA 325 (1982).)

The objections to the Bond mining plan of operations raised by Society are by no means frivolous. For the most part, however, they were raised by other participants during review of Bond's proposal conducted by BLM. The objections concerning water use and the effect of proposed mining upon animal life were raised by others and modifications to the plan were made as a result. At bottom, Society's arguments are an extension of the work of those prior commenters. Because we find that Society lacks standing to pursue the objections it seeks to belatedly raise by review before this Board, we do not discuss the standards which must be applied when reviewing the questions involving NEPA, ESA, MBTA, and FLPMA violations alleged by Society. The record before us indicates, however, that most of the points raised by Society were considered during the review by BLM and are reflected in the final decisionmaking.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge